IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, et al.,
Appellants

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR APPELLANT PENSION PLAN

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I. APPELLEES HAVE INCORRECTLY ASSUMED THAT THE TRUSTEES WILL NOT HONOR THEIR FIDUCIARY DUTY

Appellees assume that both employer and employee (or union) trustees necessarily have an interest in maximizing withdrawal liability out of loyalty to the respective parties that appointed them. Appellees state that employer trustees will maximize withdrawal liability "[b]ecause any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw. . . ." Appellees' Brief at 13.[1] Employee or union trustees will maximize the liability to obtain "the maximum amount of money for the benefit of their members. . ." and to punish the withdrawing employer. Appellees' Brief at 14. In *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334, this Court stated that:

> The language and legislative history of §302(c)(5) [29 U.S.C. §186(c)(5)] and ERISA [29 U.S.C. §§1001 *et seq.*] therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.

Accordingly, it cannot be presumed that a trustee will necessarily act in breach of his fiduciary duty, but it must be assumed that a trustee will act in accordance with that duty.

II. APPELLEES HAVE RELIED ON A NUMBER OF HIGHLY QUESTIONABLE SOURCES

In support of their thesis, appellees have cited a number of highly questionable sources. These include newspaper articles (footnotes 16 and 17 at page 15), a

1. In some situations it could be argued that the interest of a non-withdrawing company would be better served by *decreasing* withdrawal liability to entice the withdrawal and remove a competitor.

televised news report (footnote 28 at page 21), an argument advanced in the brief of a party in another case (footnote 30 at page 23), and a memorandum of another actuary to another pension fund taken entirely out of context (page 28 and Appendix B at pages 12a-13a). The Pension Plan submits that it is not proper to ask this Court to strike down an Act of Congress on the basis of such questionable authorities.

III. APPELLEES HAVE ENGAGED IN IMPROPER "SMEAR" TACTICS

Appellees make repeated derogatory references to other entities which are not involved in this case and with which the appellant Pension Plan is in no way connected. See, *e.g.*, page 19 and footnote 25; footnote 21 on page 17. Appellees imply that the appellant Pension Plan is somehow tainted by these derogatory references.

The personal attack on Union Trustee John P. Morris at pages 14-15 of appellees' brief is particularly deplorable. Appellees state that there is no basis for presuming that Mr. Morris can function in an even-handed manner. Appellees cite, *inter alia*, a magazine article entitled, "The Toughest, Meanest Union Boss in Town," the cover story of the Philadelphia Inquirer Magazine, September 4, 1983. Actually the article is not uncomplimentary to Mr. Morris. The subtitle on the cover states that "to working men and women, he's a champion who can't be bought and won't sell out." The article states on page 10 that "John Morris is regarded by the FBI's Philadelphia labor squad as 'Mr. Clean' " and on page 13 that his ascent to power was accomplished "with his 'Mr. Clean' reputation intact." The Pension Plan submits that appellees' own citation demonstrates that the integrity of John P. Morris is beyond reproach — if that has been put in question by appellees' derogatory references to other entities. As to the ability of John P. Morris to fulfill his fiduciary obligations, Mr. Morris is quoted on page 13 of

the article as stating that he knows the difference between "right and wrong" and has "always considered what the right thing to do is." He certainly does not sound like a person who will lightly breach his fiduciary duties.

This case has been presented by appellees to two lower courts with dignity and decorum. It is unfortunate that the same cannot be said of the manner in which appellees have thus far presented their case to this Court.

IV. APPELLEES ARE NOT PRECLUDED FROM SHOWING ACTUAL BIAS

The Pension Plan does not argue that a company can never show that an assessment of withdrawal liability has been tainted by bias. Evidence of bias may, of course, be presented to the arbitrator and the reviewing court. Justice O'Connor noted in the conclusion of the concurring opinion in *Connolly v. PBGC*, 106 S.Ct. 1018 (1986):

> Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. 106 S.Ct. at 1032.

Likewise, the instant case involves only a facial challenge. The Court should properly refuse to speculate about the effect of possible bias in other situations, since there is not one iota of evidence on the record of this case that the assessment of withdrawal liability against the appellees was, in any way, motivated by, or affected by, personal bias or animosity.

V. CONCLUSION

For all the reasons set forth above and in the prior briefs of the Pension Plan and of the PBGC, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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